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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

DRESSER INDUSTRIES, INC.,
Petitioner

versus

EVERETT C. WEBB,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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The petitioner, Dresser Industries, Inc. prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above case on August 4, 1976.

OPINIONS BELOW

Fifth Circuit:

The opinion of the court below in this case, is printed in Appendix A, and is reported at 536 F.2d 603.

District Court:

The opinion of the District Court for the Southern District of Texas is printed in Appendix D; it was not reported.

JURISDICTION

The judgment of the Court below (Appendix B), was entered on August 4, 1976. A timely petition for rehearing was filed on the 18th day of August, 1976 and was denied on the 29th day of September, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether or not the Court below has established a new standard of care requiring more than reasonable fitness in the requirement that a shipowner is required to furnish crew members, including the captain, with footwear for use ashore.

2. Whether or not the duty of a shipowner to provide seamen with necessary appliances, gear and equipment includes the duty to provide foot gear to the captain of a vessel for use in going ashore in usual, normal and expected conditions at the port at which the vessel is lying.

3. Whether or not the Court below should have considered the petitioner's argument that the District Court's misapplication of the provisions of the "slop chest statute" influenced his findings on other issues.

4. Whether or not the Court below put too great a restriction on a finding of comparative negligence in this case.

5. Whether or not the clearly erroneous doctrine should have been applied in this case.

STATUTES, FEDERAL RULES AND REGULATIONS INVOLVED

The Jones Act, 46 U.S.C. § 666 et seq; 46 U.S.C. § 670; 46 U.S.C. § 688.

STATEMENT

The plaintiff, a resident of Rogersville, Missouri, was employed as mate on board the M/V CANADIAN OLYMPIC while that vessel operated off the coast of South America. The vessel subsequently moved to Canadian waters and conducted oceanographic operations there until a seismic cable was lost. The vessel then went to Alaska to await a new cable and to begin a new contract with the U. S. Coast and Geodetic Survey.

The plaintiff left the vessel while she was operating in Canadian waters, just before Christmas. When he was ready to return to the vessel the captain was scheduled for time off so Webb was offered the job as captain during the regular captain's vacation. He accepted the job and received additional compensation to perform the captain's job.

The vessel was in Seward, Alaska when Webb was given the job as captain. He flew to Anchorage, Alaska in January of 1973, and then went by bus to Seward where he joined the vessel and took over as captain from the regular captain.

During normal operations the crew of the M/V CANADIAN OLYMPIC consisted of a captain, a mate, an engineer, two deckhands and a cook as well as scientific

personnel. The scientific party was headed by a party chief who was in administrative command of the operations.

At the time that Webb joined the vessel in Seward, the party chief was acting as shore coordinator and was conducting his business off of the vessel.

Webb says that he asked the party chief for "cold weather gear" a number of times and that Colton, the party chief, according to Webb, had indicated "that he would try to get them, in a very noncommittal way * * *" Colton testified that he could not recall any such request.

After Webb had been in Seward about two weeks, Colton advised him that groceries were being sent down by bus. Webb and two crew members went to the bus station and while the other two crew members loaded the groceries Webb was standing with his hands in his pockets checking off the supplies. He slipped and fell, injuring his back.

The District Court held that the vessel was unseaworthy because the vessel did not have a "slop chest" as required by 46 U.S.C. § 670, that the vessel was unseaworthy because Webb was not furnished with snowboots and that the failure of the vessel owner to provide Webb with snowboots was negligent. The District Court made no contributory negligence finding.

The Court below did not speak to the "slop chest" question or the negligence question but held that the District Court was not clearly erroneous in finding unseaworthiness. The case was remanded, however, so that the District Court could make findings on the question of Webb's comparative negligence under very restrictive instructions.

REASONS FOR GRANTING THE WRIT

I.

The Court of Appeals Has Created An Obligation On The Part Of Vessel Owners Which Goes Beyond The Realm Of Reasonableness And Which Is Contrary To The Holdings Of This Court.

By holding that a vessel owner is required to furnish crew members, including the captain of the vessel, with special footgear, and that to not do so renders the vessel unseaworthy goes far beyond the Court's directions in *Mitchell v. Trawler Racer, Inc.*, 356 U.S. 539, 80 S.Ct. 926, 4 L.Ed.2d 941 (1960) where this Court stated at 362 U.S. 550:

> "What has been said is not to suggest that the owner is obligated to furnish an accident-free ship. The duty is absolute, but it is a duty only to furnish a vessel and appurtenances reasonably fit for their intended use. The standard is not perfection, but reasonable fitness; not a ship that will weather every conceivable storm or withstand every imaginable peril of the sea, but a vessel reasonably suitable for her intended service."

By creation of a duty to provide the captain of a vessel with clothing so as to withstand normal and expected conditions existing in the port at which that captain joined the vessel, the Court of Appeals has gone far beyond the guidelines set down by this Court, and has placed an undue burden on the owners of United States vessels.

The reason for the development of the doctrine that the vessel owner owes to the seamen aboard such vessel a warranty of seaworthiness was, as is clearly explained in THE STATE OF MARYLAND, 85 F.2d 944, 945 (4th Cir. 1936): that with the advent of steam navigation, the seamen was no longer able to ascertain whether or not the vessel was seaworthy because of the complicated machinery on board. In this case there was no unique situation or sophisticated equipment. The captain was faced with the same conditions as any resident of Seward, Alaska. He was performing no task unique to seamen, he was merely standing and watching others load supplies into a truck.

The results of this case go far beyond reason in protecting the seamen. It carries to extreme a doctrine designed to protect seamen from special hazards by making the vessel owner responsible for providing the captain of the vessel with wearing apparel to withstand normal conditions ashore.

The Circuit Court recognized that it has now greatly expanded the obligation of the shipowner by its holding, saying at Appendix A, p. 27:

> "Our consideration of this case confines us neither to the temperate nor the tropical zone of analysis. In fact, the shodding requirements we find here bring us to a new decisional latitude and longitude."

It is submitted that such an expansion of the doctrine of seaworthiness was neither reasonable nor needed for the protection of seamen. Instead it places an undue burden on those attempting to operate American vessels and removes from the seaman (and in this case, even the captain himself) the obligation to provide proper clothing for his own use under normal, expected conditions, including those conditions present in a U. S. port, in a public place with no direct connection with the vessel. This Court therefore should review this matter and settle this important question.

II.

The Court Of Appeals Has Applied To The Case Of The Captain Of A Vessel In A U.S. Port The Same Standards Of Care Towards His Own Safety As Has Been Applied To Seamen At Sea. This Has Never Been Done Before And Is A Question Of Federal Law Which Has Not, But Should Be Settled By This Court.

Mr. Webb was the captain of the M/V CANADIAN OLYMPIC at the time of his injury. He was not subject to a statutory obligation to follow orders as a seaman might be while at sea. He was in no different a position than a land based worker would be when told to carry out a task. As a matter of fact he was in a much better position because he could and did have others actually perform the work.

The reason seaman are considered wards of the Court is because they become subject to strict discipline when they sign on board a ship, *Socony-Vacuum Oil Co. v. Smith,* 305 U.S. 424, 430, 83 L.Ed. 765, 270 (1939), The master himself (Webb in this case) is not subject to that same type discipline and therefore should have more responsibility for his own safety.

The Court of Appeals did not take Webb's position as captain into consideration when reviewing the District

Court's opinion, and in note 1, Appendix A, p. 14, seems to imply that since he was captain only because the regular captain was on vacation, his position as captain need not be taken into consideration.

This Court should review the action of the Court below and consider the application or the doctrine of seaworthiness to the actions of not a seaman of low rank, but the captain of the vessel.

III.

By Limiting The District Court's Consideration Of Comparative Negligence The Court Of Appeals Was Too Restrictive And Was In Direct Conflict With Accepted Tort Principles, Requiring An Exercise Of This Court's Power Of Review.

Webb was hired as the master of the M/V CANADIAN OLYMPIC and as such had an obligation to the owner to conduct himself in such a way as not to injure himself. He had been in Seward two weeks and had not made any attempt to procure boots for his own protection. Captain Webb's own testimony was that when he asked the shore supervisor for boots he said that he would try to get them, in a very noncommittal way * * *" yet the Court of Appeals (Appendix A, p. 24) limited the District Court's consideration of Webb's own negligence as follows:

> "* * * If Webb was aware both that the defendant was not going to supply him with boots and that he would have to make future trips into town on boat related errands, and if there was sufficient time in which the boots might easily and reasonably have been obtained, then Webb's inaction, in effect, constituted a failure to minimize present dangers and

> requires some lessening of damages. We note the aperture for finding comparative faults on this basis is very narrow. The rule is confined to instances where there has been generous opportunities safely to correct the known dangerous situation, and a heavy burden of proof rests with the defendant."

So narrow a view of comparative negligence is contrary to the established negligence standards and contrary to the ends of justice. To so limit a seaman's (much less a captain's) obligation to insure his own safety puts the owner of a vessel in the realm of an insurer. The Court should therefore exercise its power of review and correct the Court of Appeal's guidelines.

IV.

The Court Of Appeals Ignored A Blatant Error Of The District Court When It Failed To Overrule The Holding That The Provisions Of 46 U.S.C. § 670 Applied To The Case At Hand And Has Left Appellant And Other Operators Of Vessels In Alaskan Waters With An Undisturbed Finding Of A District Court That Such Statute Applies. This Court Should Therefore Exercise Its Powers Of Review And Correct Such Situation.

The District Court held that the provisions of the "slop chest statute", 46 U.S.C. § 670 applied to the facts of this case and found that since the M/V CANADIAN OLYMPIC did not have a slop chest aboard, the vessel was unseaworthy.

As seen in Appendix E, the statute only applies to vessels on foreign voyages or voyages between the Atlantic and Pacific coasts and does not apply to voyages between the U.S. and Canada.

Since the vessel was in a U.S. port, was not sailing at all and its last voyage was between *Canada* and Seward, it is clear that the statute does not apply, yet the Court of Appeals chose to decide the case without speaking to this clear error of the District Court. Appellant and numerous other U.S. citizens are presently engaged in oil exploration in Alaskan waters and because the holding was not overruled, are required to either provide a slop chest on these small vessels or face the risk that a claim might be made by a seaman (including a captain) that they are in violation of a statutory duty as held by the District Court in this case.

Clearly this is a situation which should have been corrected by the Court of Appeals and since it was not, cries out for this Court to exercise its power of review to give relief to Appellant and those similarly prejudiced.

V.

The Court Of Appeals Applied The Clearly Erroneous Doctrine To Findings Of Fact Induced By Errors Of Law. This Is Contrary To Decisions Of The Court And This Court Should Review.

As stated by the Court in *United States v. United States Gypsum Co.*, 333 U.S. 364, 394, 92 L.Ed. 746, 765, when a District Court bases its findings of fact on erroneous application of the law, the Appeals Court can correct those findings. In this case the findings of fact were based upon an erroneous conclusion that the appellant was required to have a "slop chest" on board the M/V CANADIAN OLYMPIC, yet the Court of Appeals applied the erroneous doctrine. This Court should therefore exercise its power of review.

CONCLUSION

There are now an estimated 598 U.S. vessels in the offshore petroleum trade attempting to compete with foreign owned vessels. If the Court of Appeals decision is let stand, it could adversely affect the ability of those owners to compete. Therefore for the reasons stated above, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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APPENDIX "A"

Everett C. WEBB, Plaintiff-Appellee,

v.

DRESSER INDUSTRIES,
Defendant-Appellant.

No. 74-4220.

UNITED STATES COURT OF APPEALS
Fifth Circuit.

Aug. 4, 1976.

A shipowner appealed from a judgment of the United States District Court for the Southern District of Texas, at Houston, John V. Singleton, Jr., J., awarding a seaman damages in a Jones Act and unseaworthiness suit. The Court of Appeals, Goldberg, Circuit Judge, held that except for the absence of a finding with respect to the seaman's contributory fault, the judgment of the district court was proper.

Vacated and Remanded.

* * *

Appeal from the United States District Court for the Southern District of Texas.

Before GEWIN, COLEMAN and GOLDBERG, Circuit Judges.

GOLDBERG, Circuit Judge:

Dresser Industries appeals from a $40,000 district court judgment in favor of plaintiff-appellee Everett C. Webb, a seaman on Dresser's vessel the M/V CANADIAN OLYMPIC. Webb, claiming that he received injuries as a result of defendant's negligence and breach of its warranty of seaworthiness, brought this action pursuant to the Jones Act, 46 U.S.C. § 688 *et seq.*, and general maritime law. The controversy was tried without a jury. The trial judge found both negligence and unseaworthiness and rendered a verdict for the plaintiff. Appellant Dresser Industries asserts that the court erred in 1) finding negligence and unseaworthiness; 2) failing to hold that plaintiff Webb was negligent; 3) denying Dresser's motion for a continuance; and 4) calculating Webb's lost earnings. After careful consideration of these claims, we hold that except for the absence of a finding with respect to Webb's contributory fault, the judgment of the district court was proper. Therefore, we remand this cause to that court for consideration of the issue of plaintiff's negligence.

I. Facts

Everett C. Webb served as a member of the crew[1] of the M/V CANADIAN OLYMPIC, a 199 ton vessel involved in oceanic surveying. Prior to the accident from which this suit arose, the ship was docked at Seward, Alaska, for outfitting for Alaskan operations. Plaintiff had been aboard the moored boat for approximately two weeks when supplies from Anchorage arrived at the

1. The M/V CANADIAN OLYMPIC's crew included the party chief, captain, mate, engineer, deckhand, and cook as well as the scientific party charged with seismic research. Webb regularly served as the mate, but at the time of the accident he had become acting captain because of the temporary absence of the regular captain, who was on vacation.

Seward bus station. The district court found that the M/V CANADIAN OLYMPIC's party-chief, David Colten, who was in administrative control of the vessel and who had responsibility for all operations including supplies and safety equipment, "order[ed] plaintiff to go ashore to pick up supplies." Webb and two other members of the crew went into town to get the ship's provisions at the local bus station. Because it was wintertime, significant amounts of snow and ice had accumulated in Seward making walking conditions very hazardous. While checking off the supplies being loaded into the crew's truck, plaintiff slipped on the snow and ice, sustaining the injuries for which damages were awarded by the district court.

At trial, Webb argued that the failure of Dresser Industries to provide him with proper footwear for journeying ashore in the ice and snow in the course of his duties as a seaman rendered the M/V CANADIAN OLYMPIC unseaworthy and constituted negligence under the Jones Act. He testified that he had realized that his clothing was inadequate. At the time of the fall, he was wearing the smooth soled boots that he had used in the tropics. He stated, however, that on three different occasions he had told his superior, Mr. Colten, about his need for proper boots. According to Webb, Colten had indicated "that he would try to get them, in a very noncommittal way . . ." Colten testified that he could not recall any such request.

The court also heard statements to the effect that an individual wearing smooth soled shoes like plaintiff's would not be "properly rigged" for working on snow and ice and that wearing such shoes in the Alaskan winter was dangerous. A safety expert testified that another type

of available boot, presented to the court by the plaintiff's attorney, would have been a definite aid to one working on snow and ice and would have eased the difficulty of ambulating on such surfaces.[2]

After hearing the evidence, the district court judge filed his findings of fact. He determined that plaintiff was injured while "working in the course and scope of his employment."[3] He observed:

> At the time of and prior to the date of plaintiff's injury, . . . Mr. Colten, the party chief, was aware of the very hazardous walking conditions in and around Seward, Alaska. Nevertheless, the defendant, Dresser Industries, Inc., did not provide any kind of special boots or shoes for members of the crew to use in cold weather and to enable them to better walk on the slippery surfaces ashore, nor did Mr. Colten take any steps to requisition such special boots or shoes.

2. There was also testimony that Dresser provided special wet weather gear including boots for the scientific crew. It was stated, however, that it was not customary for the boat to carry boots and other cold weather gear for crew members going ashore in the course of their duties as seamen and also that the equipment supplied to the scientific crew was not satisfactory for shore tasks performed on snow and ice.

3. On appeal, Dresser Industries does not challenge Webb's contention that when he went to the bus station he was a seaman, acting on behalf of the ship. Nor does appellant dispute the district court's conclusion that Webb falls within the scope of coverage provided by both the Jones Act and the general maritime law. Moreover, no special problems as to the scope of the maritime law are presented by the fact that the injuries sustained here actually occurred on land, and defendant makes no such contentions. *See* 46 U.S.C. § 740; *Gutierrez v. Waterman Steamship Corp.*, 373 U.S. 206, 83 S.Ct. 1185, 10 L.Ed.2d 297 (1963); *O'Donnell v. Great Lakes Dredge & Dock Co.*, 318 U.S. 36, 63 S.Ct. 488, 87 L.Ed. 596 (1943); *See generally* M. Norris, *The Law of Maritime Personal Injuries* § 310 (3 ed. 1975).

. . . . .

> At the time of his injury, plaintiff was subject to all orders given by Mr. Colten and was responsible for seeing that supplies were picked up from the bus station and loaded aboard the vessel.

On the basis of these findings, the court found the defendant negligent for failing to provide plaintiff a safe place to work and for violating the slop chest statute, 46 U.S.C. § 670, which requires that certain vessels carry clothing for sale to seamen. With respect to the claim of unseaworthiness, the court said:

> The failure of defendant, Dresser Industries, Inc., to provide plaintiff with special boots or shoes to use in cold weather and to enable him to better walk on icy or other slippery surfaces and other proper and adequate clothing, tools, devices, appliances and appurtenances, that would have afforded the plaintiff the opportunity of performing his duties in a safe manner, rendered the vessel, "THE CANADIAN OLYMPIC," unseaworthy.

With these findings before us, we turn to the legal issues raised by this appeal.

II. THE LEGAL ISSUES

A. The Standard of Review

[1] The district court's resolution of the questions of seaworthiness and negligence are considered findings of fact. *See, e. g., McAllister v. United States,* 348 U.S. 19, 20, 75 S.Ct. 6, 7-8, 99 L.Ed.2d 20, 24 (1954); *See* M. Norris, *The Law of Maritime Personal Injuries* §§ 131, 265, 314 (3d 1975); *See generally* C. Wright & A. Miller, *Federal Practice & Procedure: Civil* § 2585 (1971). As

such, these determinations are to be overturned by an appeals court only if they are clearly erroneous. *Id;* Rule 52(a), Fed. R. Civ. P.

B. Seaworthiness

[2] Under admiralty law, an absolute and non-delegable duty is imposed on the shipowner to furnish a vessel reasonably safe and fit for its intended purpose. *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539, 80 S.Ct. 926, 4 L.Ed.2d 941; *White v. Rimrock Tidelands, Inc.*, 5 Cir. 1969, 414 F.2d 1336; *see generally* Norris, *supra* §§ 298 *et seq*. This obligation includes the duty to provide necessary appliances, gear, and equipment. *See, e. g., Mahnich v. Southern S.S. Co.*, 321 U.S. 96, 64 S.Ct. 455, 88 L.Ed. 561 (1944); *see generally* Norris, *supra* §§ 301, 305.[4]

[3] In *Walker v. Harris*, 5 Cir. 1964, 335 F.2d 185, Chief Judge Brown set forth the subsidiary questions leading to the ultimate conclusion of seaworthiness *vel non:*

> "[W]hat is the vessel to do? What are the hazards, the perils, the forces likely to be incurred? Is the vessel or the particular fitting under scrutiny, sufficient to withstand those anticipated forces?"

Id. at 191. In reference to the questions posed in *Walker*, it is clear that an integral part of the M/V CANADIAN OLYMPIC's maintenance and thus its ability to perform its Alaskan functions included the movement of provisions

4. The shipowner's duty to maintain a seaworthy ship is absolute and a cause of action for breach of that duty "arises even though the unseaworthy condition was unknown to the owner." Norris, *supra* § 301 at 10.

from shore to sea. The defendant, through its agent Colten, was fully aware of the need for such land missions. According to the district court, Colten directly ordered the plaintiff to take charge of the particular chore in question here. Moreover, Colten knew that the ice and snow, which one would reasonably expect to encounter ashore in the Alaskan winter, presented difficult and dangerous environmental conditions. He also knew or could easily have anticipated that special winter boots not available on the M/V CANADIAN OLYMPIC were necessary to carry out the boat's errands safely in such conditions. These factors, when analyzed in the context of the *Walker* criteria, lead us to the conclusion that the district court was not clearly erroneous in finding unseaworthiness.

[4] Defendant, however, calls to our attention testimony to the effect that crew members traditionally have furnished their own clothing. The importance of this custom, if it be such, is undercut in the case before us by the fact that Dresser admittedly made available to the scientific crew wet weather gear including boots. *See* note 2 *supra*. More importantly, it has long been held that the determination of reasonable fitness is not limited by custom. *E. g., White v. Rimrock Tidelands, Inc.*, 5 Cir. 1969, 414 F.2d 1336, 1339 (the fact that safety equipment, particularly protective boots, may not have been provided by other drillers is not controlling); *Bryant v. Partenreederei-Ernest Russ*, 4 Cir. 1974, 330 F.2d 185. In view of the "awesome obligations of seaworthiness," *Saunders v. Pool Shipping Co.*, 5 Cir. 1956, 235 F.2d 729, 730; *see* Norris, *supra* § 298; *see also, Cox v. Esso Shipping Co.*, 5 Cir. 1957, 247 F.2d 629, 636 (shipowner's "heavy obligation to provide seaworthy equip-

ment") and the less than controlling significance of custom, we find on the record before us that the district court did not err in refusing to permit the testified-to custom set the outer limits of defendant's duties.

Thus, after careful scrutiny of the trial court proceedings, we have decided to affirm the district court's seaworthiness conclusion. The judge below obviously credited much of seaman Webb's testimony, particularly with respect to the circumstances of the accident. Given this factual background, and the above analysis, we do not find incorrect the lower court's determination that with the M/V CANADIAN OLYMPIC docked at a port where much ice and snow covered the ground, proper footgear should have been made available to plaintiff. *See, White v. Rimrock Tidelands, supra* (allegation that defendant shipowner did not provide protective boots or other safety equipment to seaman directed to enter tank containing caustic drilling mud stated a claim for unseaworthiness); *cf. Johnson v. Warrior & Gulf Navigation Co.*, 5 Cir. 1975, 516 F.2d 73 (finding stevedore's obligation to furnish longshoreman with proper shoes).

[5] In affirming the lower court's conclusion of unseaworthiness, we are not creating a general duty of a shipowner to provide all of its seamen with boots adequate for all foreseeable shore duties. Instead, the defendant need make boots available only for those crew members ordered to work under foreseeably adverse circumstances. Alternatively, the defendant can protect itself by sending ashore only those seamen who it has ascertained have the necessary footwear whether that footwear is provided by the shipowner or the sailor.

C. Negligence

The district court found as an alternative theory in support of its verdict that the plaintiff should recover under the Jones Act, 46 U.S.C. §§ 688 *et seq.* The basis of the court's decision was its determination that the defendant 1) negligently failed to maintain a safe place to work and 2) violated a safety statute, thus requiring a finding of negligence *per se*. Having affirmed the lower court's decision that the M/V CANADIAN OLYMPIC was unseaworthy, we need not rely on the district court's alternative Jones Act theories, and therefore, we pretermit any discussion of the negligence issues.[5]

D. Comparative Negligence

[6] The trial court made no finding as to whether or not the plaintiff's own negligence legally contributed to his injuries. In the circumstances of this case, we think that this failure was error necessitating that we vacate the lower court's judgment and remand the cause for consideration of the issue of Webb's negligence.[6]

[7] Neither assumption of risk nor contributory negligence is a bar to a seaman's recovery under either the doctrine of seaworthiness or the Jones Act. 45 U.S.C. § 53; *The Max Morris v. Curry*, 137 U.S. 1, 11 S.Ct. 29, 34 L.Ed. 586 (1890); *The Arizona v. Anelich*, 298

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5. Defendant contends *inter alia that* 46 U.S.C. §§ 441-445 pertaining to oceanographic research vessels precludes application of the slop chest statutes to the M/V OLYMPIC. We need not reach this issue, however, in view of our disposition above.

6. Although defendant did not raise the comparative negligence issue as directly as it might have, we believe that the issue was placed before the district court in a manner sufficient to require a determination of whether or not plaintiff was at fault.

U.S. 110, 56 S.Ct. 707, 80 L.Ed. 1075 (1936); *Beadle v. Spencer,* 298 U.S. 124, 56 S.Ct. 712, 80 L.Ed. 1082 (1936); *Socony-Vacuum Oil Co. v. Smith,* 305 U.S. 424, 59 S.Ct. 262, 83 L.Ed. 265 (1939); *Klimaszeuski v. Pacific-Atlantic Steamship Co.,* 3 Cir. 1957, 246 F.2d 875; *Manning v. M/V Sea Road,* 5 Cir. 1965, 358 F.2d 615; *Britt v. Corporation Peruna de Vespores,* 5 Cir. 1975, 506 F.2d 927; *see generally* Norris, *supra* at §§ 311-13. When the plaintiff has been negligent, however, the damages otherwise awardable are mitigated in accordance with the doctrine of comparative negligence. *Pope & Talbot, Inc. v. Hawn,* 346 U.S. 406, 74 S.Ct. 202, 98 L.Ed. 143 (1953); *Socony-Vacuum Oil Co. v. Smith, supra; Stein v. Sea-Land Services, Inc.,* 5 Cir. 1971, 440 F.2d 1181; *Manning v. M/V Sea Road, supra; Cox v. Esso Shipping Co.,* 5 Cir. 1957, 247 F.2d 629.

Appellant argues that plaintiff was negligent because he made no attempt to obtain proper gear from any Seward stores—this notwithstanding his obvious knowledge of the danger from the snow and ice and his clear opportunity to make such a purchase. Appellant also contends that Webb exposed himself to the snow and ice in a manner not required by his duty to pick up supplies at the bus station—in other words, there were safer alternative means of carrying out the party-chief's order. Specifically, appellant claims that in following the defendant's orders it was not necessary for plaintiff, whose testimony clearly indicates that he understood the snow/ice hazard, to take inventory on the obviously dangerous bus lot. Moreover, Dresser contends that plaintiff's manner of walking on the ice, with his hands in his pockets, was a primary cause of his injuries.

Because of the peculiar risks and dangers as well as the rigorous discipline and obligation to follow orders which are integral parts of their profession, seamen are traditionally given special attention by the federal courts,

> [S]eamen are the wards of the admiralty, whose traditional policy it has been to avoid, within reasonable limits, the application of rules of the common law which would affect them harshly because of the special circumstances attending their calling.

Socony-Vacuum Oil Co. v. Smith, 305 U.S. at 431, 59 S.Ct. at 266, 83 L.Ed. at 270. *See also Spinks v. Chevron Oil Co.,* 5 Cir. 1975, 507 F.2d 216, 223. Notwithstanding this heightened solicitude for sailors, the use of unsafe equipment and methods in the face of an available safe alternative, *see Socony-Vacuum Oil Co. v. Smith, supra,* 305 U.S. at 432, 59 S.Ct. at 267, 83 L.Ed. at 271; *Manning v. M/V Sea Road,* 5 Cir. 1965, 358 F.2d 615; or the failure to take available action to minimize the dangers in a necessarily risky, course of action, *see Superior Oil Co. v. Trahan,* 5 Cir. 1963, 322 F.2d 234, requires a finding of comparative fault and consequently mitigation of damages.

Assuming that Webb informed Colten of his need for boots and justifiably relied on Colten to procure the necessary shoes, then we would be reluctant to sanction a finding that plaintiff was negligent in not going into Seward to look for footwear. A finding of comparative fault for this reason would tend to undermine the boatowner's duty as affirmed in this opinion and would be contrary to the special position of the seaman in admiralty law. However, we do not conclude that there are never circumstances under which plaintiff's failure to acquire his own boots

would mandate a partial mitigation of damages. If Webb was aware both that the defendant was not going to supply him with boots and that he would have to make future trips into town on boat-related errands, and if there was sufficient time in which the necessary boots might easily and reasonably have been obtained, then Webb's inaction, in effect, constituted a failure to minimize present dangers and requires some lessening of damages. We note that the aperture for finding comparative fault on this basis is very narrow—the rule is confined to instances where there has been generous opportunities safely to correct the known dangerous situation,[7] and a heavy burden of proof rests with the defendant.

Also, if the plaintiff never mentioned his improper footwear to his chief, or, if ignoring[8] a safe method of work,

7. Here, the boat had been docked at Seward with the plaintiff aboard for two weeks and there is testimony that the plaintiff had been into Seward on a number of different occasions prior to the date of his accident.

8. The district court never resolved the conflicting testimony, *see* Section I *supra*, as to whether or not plaintiff Webb protested to his superior Colten about the lack of proper shoes and fairly relied on Colten to provide the necessary boots. If the court accepted plaintiff's statements that he informed the party chief three times of his footwear deficiency, then this alternative method of protecting his own well-being had been exhausted. If, however, Webb knew of the danger presented by his inadequate footgear and did not so inform his superior, then he should be viewed as having failed to take advantage of a viable avenue of safe conduct. Under the specific circumstances of this case, we believe, as noted above, that the latter finding would warrant a holding that the plaintiff was to some extent at fault. *See Mazzanti v. Lykes Brothers Steamship Co.*, 5 Cir. 1975, 524 F.2d 961; *Bonura v. Sea Land Service, Inc.*, 5 Cir. 1974, 505 F.2d 665, 670-71 (Gee, J., dissenting); *DuBose v. Matson Navigation Co.*, 9 Cir. 1968, 403 F.2d 875; *cf. White v. Rimrock Tidelands, Inc.*, 5 Cir. 1969, 414 F.2d 1336 (no comparative negligence where no knowledge of the danger and therefore no basis for protesting to superiors). These circumstances include the plaintiff's continuing

plaintiff performed the bus station errand in an unnecessarily dangerous manner, then a finding that plaintiff was negligent would be proper.[9]

Ultimately the resolution of Dresser's contentions here depends on the making of basic factual determinations including findings with respect to what Webb actually told Colten, the opportunity for Webb to obtain boots, and the manner in which Webb carried out his responsibilities at the bus station.[10] This task is most properly undertaken

personal knowledge of the absence of available proper footwear and the fact that plaintiff was aboard Dresser's boat for two weeks while it was docked at Seward—thus presenting the possibility that after notification to the party chief the equipment failure could have been remedied (or plans made for sending only adequately booted sailors into town). All of this court have occurred without impeding the crew's regular work. *Compare Mazzanti v. Lykes Bros. Steamship Co., supra*. On remand, the district court should settle the remaining disputed factual questions, and then consider the effect of its conclusion on the issue of comparative negligence.

9. In *Johnson v. Warrior & Gulf Navigation Co.*, 5 Cir. 1975, 516 F.2d 77, this Court affirmed a district court determination of plaintiff's negligence where a longshoreman wore hushpuppy shoes while unloading a ship. However, we are not told whether or not the plaintiff in the *Johnson* case had easy access to a pair of work boots, informed his superior of his need for boots, or lacked alternate methods for completing his assigned task. For these reasons, among others, the *Johnson* decision is of limited usefulness to us in our examination of the present controversy.

10. Plaintiff contends that consistent with the explicit findings of fact and conclusions of law, the trial judge made an implied finding of no contributory fault. The general rule is stated by Professor Moore as follows:

> Where the trial court fails to make findings, or to find on a material issue, and an appeal is taken, the appellate court will normally vacate the judgment and remand the action for appropriate findings to be made.

J. Moore, *Federal Practice* § 52.06[2] at 2718. We regard plaintiff's possible negligence as a material issue, do not observe any clear indication that a finding on that issue is implicit in the district court's verdict, and consequently encounter no substantial reason to depart from the general rule as expressed above.

in the first instance by the district court judge who originally heard the parties testify and can best judge their credibility. Thus, we send this case back to the lower court for its consideration of appellant's possible contributory fault. On remand, if the trial court concludes that Webb was negligent, then that court must apportion the damages in accordance with the rules governing comparative fault in maritime cases. If, on the other hand, the facts supporting the purported negligence of plaintiff were not proved, then the original judgment in this case should be re-entered by the district court.

E. Miscellaneous Contentions

[8] Appellant argues that the trial court's denial of its motion for a continuance impaired its ability to adequately discover information about plaintiff's past earnings. As we stated in *United States v. 110 Bars of Silver*, 5 Cir. 1974, 508 F.2d 799:

> The grant or denial of a motion for continuance rests with the sound discretion of the court, and will be reversed only when an abuse of discretion is shown. *Id.* at 801.

Our examination of the record leads us to conclude that the district court did not abuse its discretion.

[9] Finally, Dresser contends that the evidence did not support the judge's findings as to lost earnings. Although complete wage information for all recent years was not made available, the record contains sufficient evidence to support the court's finding.

Our consideration of this case confines us neither to the temperate nor the tropical zone of analysis. In fact,

the shodding requirements we find here bring us to a new decisional latitude and longitude. Just as meteorology has an essential role in the world of ocean travel, so also there is an inescapable responsibility on shipowners to provide seaworthy vessels and on sailors to conduct themselves, insofar as is compatible with the rigors of their calling, in a prudent and responsible manner. Although we have determined that the defendant here failed its obligation, we believe that additional findings are necessary to a fair evaluation of the plaintiff's conduct—an evaluation which, in the first instance, should be undertaken by the trial court. Thus, we remand this cause to the district court for its consideration of the issue of comparative negligence.

VACATED and REMANDED.

APPENDIX "B"

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 74-4220

D. C. Docket No. CA 73-H-917

EVERETT C. WEBB,
Plaintiff-Appellee,

v.

DRESSER INDUSTRIES,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Texas

Before GEWIN, COLEMAN and GOLDBERG, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, vacated and that this cause be and the same is hereby remanded to the said District Court in accordance with the opinion of this Court.

August 4, 1976

Issued as Mandate:

APPENDIX "C"

UNITED STATES COURT OF APPEALS
Fifth Circuit
Office of the Clerk

Edward W. Wadsworth
Clerk

Tel. 504-589-6514
600 Camp Street
New Orleans, La. 70130

September 29, 1976

TO ALL COUNSEL OF RECORD

No. 74-4220—Everett C. Webb v. Dresser Industries

Dear Counsel:

This is to advise that an order has this day been entered denying the petition( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

Edward W. Wadsworth, Clerk

By: CLARE SACHS
Deputy Clerk

cc: Mr. F. E. Billings
Messrs. Gus Kolius

APPENDIX "D"

IN THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS

HOUSTON DIVISION

C.A. No. 73-H-917

EVERETT C. WEBB

vs.

DRESSER INDUSTRIES, INC.

JUDGMENT

THIS CASE having been heard on the pleadings and proof adduced by the respective parties and the stipulations of the parties as offered in evidence, and having been duly argued and due deliberation having been had, and in accordance with the findings of fact and conclusions of law entered by this Court on this date, it is determined that the Plaintiff, EVERETT C. WEBB, is entitled to recover of and from the Defendant, DRESSER INDUSTRIES, INC., the sum of FORTY THOUSAND DOLLARS ($40,000.00) by reason of the matters claimed of and made the basis of Plaintiff's suit against the Defendant. It is therefore:

ORDERED, ADJUDGED and DECREED that the Plaintiff, EVERETT C. WEBB, does have and recover of and from the Defendant, DRESSER INDUSTRIES, INC., the sum of FORTY THOUSAND DOLLARS ($40,000.00), together with interest thereon at the rate of six per cent (6%) per annum from the date of judgment until paid. It is further

ORDERED, ADJUDGED and DECREED that all costs accrued herein are taxed against the Defendant, DRESSER INDUSTRIES, INC.

DONE at Houston, Texas, on this the 18th day of October, 1974.

/s/ JOHN V. SINGLETON, JR.
United States District Judge

Approved as to form:

/s/ GUS KOLIUS
Gus Kolius, Attorney in Charge
for Plaintiff, Everett C. Webb

F. E. Billings, Attorney in Charge
for Defendant, Dresser Industries, Inc.

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EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS IN THE DISTRICT COURT

The Court: Well, my Findings of Fact and Conclusions of Law are as follows:

Plaintiff, Everett C. Webb, has brought this action for personal injuries under the General Maritime Law, as well as 46 U.S.C.A., Section 688 et seq., commonly called the Jones Act, against the owner and the operator of the vessel, "THE CANADIAN OLYMPIC," which is the Defendant, Dresser Industries, Inc.

This action is brought pursuant to Rule 9(h) of the Federal Rules of Civil Procedure and the plaintiff asserts his rights and remedies at common law by virtue of the provisions of the Savings to Suitors clause of the Judicial Code of the Judicial Code, and all other applicable laws.

Everett C. Webb was a member of the crew of "THE CANADIAN OLYMPIC," at the time it was docked at a scallop dock in the Gulf of Alaska, near Seward, Alaska. On or about January 19, 1973, while the plaintiff, Everett C. Webb, was ashore to pick up supplies for the vessel,

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"THE CANADIAN OLYMPIC," and while in the course and scope of his employment, he slipped on an icy surface, thereby causing severe injuries to his back and neck and other parts of his body. The plaintiff contends that the defendant, Dresser Industries, Inc., was negligent in failing to provide him with a safe place to work, failing to provide him with proper and adequate clothing, tools, devices and equipment, among other reasons, and that the

vessel, "THE CANADIAN OLYMPIC," was unseaworthy because plaintiff was not provided with proper and adequate clothing, devices, appliances, appurtenances, and crew enabling him to perform his duties in a safe manner.

This action having been tried to the Court, the Court now makes the following Findings of Fact and Conclusions of Law:

(1) Plaintiff, Everett C. Webb, was injured on January 19, 1973, while ashore to pick up supplies for the vessel, "THE CANADIAN OLYMPIC." At the time of his injury, such vessel, a twin-screw, steel motor supply vessel which is a floating vessel, was in navigation in navigable waters of the United States in

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the Gulf of Alaska, near Seward, Alaska.

(2) At all times material to this lawsuit, the vessel, "THE CANADIAN OLYMPIC," was owned and operated by the defendant, Dresser Industries, Inc.

(3) At the time he received his injuries and at all times material to this lawsuit, plaintiff was working in the course and scope of his employment as a member of the crew of the vessel, "THE CANADIAN OLYMPIC."

(4) At all times material to this lawsuit, "THE CANADIAN OLYMPIC" was a vessel of 75-tons burden or upward, owned by a citizen of the United States, bound from the Pacific coast of the continental United States to Alaska.

(5) At all times material to this lawsuit, the duty of picking up supplies ashore at the bus station for use on

the vessel with the use of the truck, on or about January 19, 1973, was in the course and scope of the duties of the crew aboard "THE CANADIAN OLYMPIC."

(6) At all times material to this lawsuit, David Horace Colton was employed by the defendant, Dresser Industries, Inc.,

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as the party chief aboard the vessel, "THE CANADIAN OLYMPIC," and in such capacity was in administrative control of the vessel and had responsibility for all operations on the vessel except navigation therefor, and was in overall charge of providing the necessary food, supplies and equipment for the safety of the vessel and its crew.

(7) At the time of plaintiff's accident on January 19, 1973, and for several weeks prior to and after that date, there was much ice and snow in and around Seward, Alaska, and walking conditions were very hazardous and it was extremely cold.

(8) Plaintiff was hired by the defendant, Dresser Industries, Inc., on or about August 4, 1972, as a member of the crew of "THE CANADIAN OLYMPIC," which was at that time at or near Maracaibo, Venezuela. Plaintiff was subsequently hired by the defendant, Dresser Industries, Inc., as a member of the crew of such vessel when it was moved at or near Seward, Alaska, and this constituted the first time that plaintiff had ever been to Alaska to work.

(9) At the time of and prior

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to the date of plaintiff's injury on January 19, 1973, Mr. Colton, the Party Chief, was aware of the very hazardous walking conditions in and around Seward, Alaska. Nevertheless, the defendant, Dresser Industries, Inc., did not provide any kind of special boots or shoes for members of the crew to use in cold weather and to enable them to better walk on the slippery surfaces ashore, nor did Mr. Colton take any steps to requisition such special boots or shoes.

(10) As Party Chief, Mr. Colton was the first person aboard "The Canadian Olympic" to be notified that supplies for such vessel were coming from Anchorage, Alaska, by bus. It was essential to the operation of the vessel that these supplies be picked up at the bus station and placed aboard the vessel and the task of picking up the supplies and loading them aboard the vessel was a part of the regular duties of the crew. When he was notified of the arrival of the supplies, Mr. Colton notified plaintiff, who took two other members of the crew with him to pick up the supplies. It was essential that a member of the crew take an

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inventory of the various boxes and cartons constituting the supplies at the time of their arrival at the bus station and make a report to determine whether any of the supplies that had been ordered were missing. Thus, at the time of his injury, plaintiff was subject to all orders given by Mr. Colton and was responsible for seeing that supplies were picked up from the bus station and loaded aboard the vessel.

(11) Defendant, Dresser Industries, Inc., in failing to provide plaintiff with special shoes or boots to use in cold weather and to enable him to better walk on ice or slippery surfaces, failed to provide him with a safe place to work and failed to provide him with proper and adequate boots or shoes or other tools, devices and equipment, enabling him to perform his duties in a safe manner. Furthermore, in ordering plaintiff to go ashore to pick up supplies without providing him with such special boots or shoes or advising him of the necessity of acquiring such special boots or shoes, defendant Industries, Inc., ordered and required plaintiff to work and follow instructions at unsafe and dangerous times and failed to warn

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the plaintiff of the inherent dangers involved in the work and instructions he was ordered to do and follow.

(12) The failure of defendant, Dresser Industries, Inc., to provide plaintiff with special boots or shoes to use in cold weather and to enable him to better walk on icy or other slippery surfaces and other proper and adequate clothing, tools, devices, appliances and appurtenances, that would have afforded the plaintiff the opportunity of performing his duties in a safe manner, rendered the vessel, "The Canadian Olympic," unseaworthy.

(13) I also find that "The Canadian Olympic" was a vessel as described in 46 U.S.C.A., Section 666, and in that connection, the court concludes as a matter of law that the use of the words in that section of the statute, the burden of 75 tons or upward, means, in law — well, it is understood in practice and custom and always con-

strued to mean the net registered tonnage of a vessel. The net registered tonnage of this vessel was 133 tons, if I'm not mistaken. Being a vessel as defined in Section 666, that vessel was required to have

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what is described as a slop chest in Section 670, 46 U.S.C.A., Section 670, and that that Section 670 is a statute that is enacted for the safety of the members of the crew by the Congress, for the safety of the members of the crew, and that the Dresser Industries, Inc., failed to provide that slop chest as described in that statute and, consequently, that failure was a violation of the safety statute and was itself negligent, as a matter of law.

(14) At the time of his injury on January 19, 1973, plaintiff was 48 years of age with a life expectancy of 24.7 years, according to the United States Life Tables, 1968.

(15) As a direct and proximate result of the injuries and damages suffered by plaintiff Everett C. Webb, plaintiff has sustained loss and damages in the following particulars, to wit.

The amount thereof is of considerable difficulty to the Court. There is no doubt about the fact that, as a direct and proximate cause of his fall, he sustained an injury, as I have already indicated.

He had an operation, a laminectomy,

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of C-5 and 6 and C-6 and 7, as described by Dr. Litel. The real point of the amount of damages in this case is

whether or not Mr. Webb, as a result of these injuries, will sustain any loss of future earning capacity.

It is of significance to the Court that Mr. Webb sustained a similar type of injury, if not an identical injury, in 1955 and that he recovered from that, although no operation was necessary, sufficiently to where he has, since that time, performed his regular vocation as a seaman and as a mate without experiencing any difficulty. In other words, he fully recovered from that fall and injury to his cervical spine.

Dr. Litel's testimony indicated that insofar as he was concerned, the operation was a success, although he, Mr. Webb, still complains of some pain and numbness in his left arm — pain in his neck and numbness in his left arm.

Dr. Litel indicated to the Court, or the Court's conclusion of Dr. Litel's testimony was, that an operation of this kind is normally not significantly disabling. He did

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testify to a ten to fifteen per cent permanent disability, but he also stated that he really didn't know what that meant.

I gathered from Dr. Litel, and I've also gathered from Mr. Webb's testimony, that he is able to perform his work. He does from time to time experience some difficulty.

You must bear in mind that the operation was performed in 1973 and it would just seem, from the testimony of Dr. Litel, that Mr. Webb's difficulties should get better because of the operation and the type—and

the place where the operation was. It would not appear to the Court to be a significantly disabling operation to the type of work Mr. Webb does and is qualified to do and I would think that he can follow it rather easily.

I have concluded that for physical pain and mental anguish from the date of the accident to the present time —and in arriving at a figure, there is always difficulty for any finder of fact, any fact finder, whether it be jury or judge. You just sort of have to draw on your own common experiences. I would say that a reasonable sum of money for such physical

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pain and suffering in connection with this accident and the operation would be $15,000.

I would say that for physical pain and mental suffering which, in all reasonable probability he might sustain in the future, that a sum of $5,000 would be adequate.

I would conclude from the evidence that he has lost earnings from the date of the accident to the present time in the amount of $20,000.

I do find that insofar as any significant amount, that Mr. Webb will not lose any significant amount of future earnings, so that if you add all that together, you have $40,000.

And that will be the amount of money that I will find for Mr. Webb in this case.

The conclusions of law other than the ones that I have already made that this is a vessel within the terms of 46 U.S.C.A., Section 666 and the definition of tons

burden, as I have already given, I would find that the doctrine of seaworthiness imposes upon the ship owner the absolute, continuing and non-delegable

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duty to provide a seaman and member of the crew with a ship, equipment, appurtenances and personnel which are reasonably fit for their intended use.

(16) The warranty of seaworthiness and the provisions of 46 U.S.C.A., Section 688 et seq., commonly called the Jones Act, extend to injuries sustained by a seaman while he is ashore if he is in the course and scope of his employment. In the instant case, defendant, Dresser Industries, Inc., in failing to provide plaintiff with special shoes or boots to use in cold weather and to better enable him to walk on icy or other slippery surfaces, failed to provide plaintiff with a safe place to work and failed to provide plaintiff with proper and adequate clothing, tools, devices and equipment. In failing to provide plaintiff with such special shoes or boots and failing to advise plaintiff of the necessity of acquiring such special shoes or boots, the defendant, Dresser Industries, Inc., ordered and required the plaintiff to work and follow instructions at unsafe and dangerous times and failed to warn the plaintiff of the inherent

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dangers involved in the work and instructions he was ordered to do and follow. Furthermore, the failure of the defendant, Dresser Industries, Inc., to provide plaintiff with such special shoes or boots and other proper and

adequate clothing, tools, devices, appliances and appurtenances, rendered the vessel, "The Canadian Olympic," unseaworthy. Such negligence and breaches of the warranty of seaworthiness were the proximate cause of plaintiff's—well, were a cause in whole or in part, I believe it is, rather than a proximate cause—is it not, in admiralty, a cause in whole or in part? Is that correct?

Mr. Kolius: Yes, Your Honor. That should have been.

The Court: Right. A cause in whole or in part of plaintiff's injury, giving rise to an action against the ship owner based upon negligence under the general maritime law and unseaworthiness.

And I further find that they were negligent in failing to provide a slop chest, as provided by 46 U.S.C.A., Section 670.

By reason of the foregoing,

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plaintiff, Everett C. Webb, is entitled to recover damages of and from the defendant in the sum of $40,000 plus interest from the date of the judgment at the rate of six per cent per annum and costs.

All right.

Mr. Kolius: I see no omissions, Your Honor. Thank you very much.

The Court: Somebody give me a judgment.

Mr. Kolius: I'll have it over here in a day.

The Court: All right.

Mr. Billings: Thank you, Your Honor.

APPENDIX "E"

§ 670. Slop chests

Every vessel mentioned in section 666 of this title shall also be provided with a slop chest, which shall contain a complement of clothing for the intended voyage for each seaman employed, including boots or shoes, hats or caps, underclothing and outer clothing, oiled clothing, and everything necessary for the wear of a seaman; also a full supply of tobacco and blankets. Any of the contents of the slop chest shall be sold, from time to time, to any or every seaman applying therefor, for his own use, at a profit not exceeding 10 per centum of the reasonable wholesale value of the same at the port at which the voyage commenced. And if any such vessel is not provided before sailing, as herein required, the owner shall be liable to a penalty of not more than $500. The provisions of this section shall not apply to vessels plying between the United States and the Dominion of Canada, Newfoundland, the Bermuda Islands, the Bahama Islands, the West Indies, Mexico and Central America. June 26, 1884, c. 121, § 11, 23 Stat. 56.

§ 666. Medicines

Every vessel belonging to a citizen of the United States, bound from a port in the United States to any foreign port, or being of the burden of seventy-five tons or upward, and bound from a port on the Atlantic to a port on the Pacific, or vice versa, shall be provided with a chest of medicines; and every sailing vessel bound on a voyage across the Atlantic or Pacific Ocean, or around Cape Horn, or the Cape of Good Hope, or engaged in the whale or other fisheries, or in sealing, shall also be pro-

vided with, and cause to be kept, a sufficient quantity of lime or lemon juice, and also sugar and vinegar, or other antiscorbutics, to be served out to every seaman as follows: The master of every such vessel shall serve the lime or lemon juice, and sugar and vinegar, to the crew, within ten days after salt provisions mainly have been served out to the crew, and so long afterward as such consumption of salt provisions continues; the lime or lemon juice and sugar daily at the rate of half an ounce each per day; and the vinegar weekly, at the rate of half a pint per week for each member of the crew. R.S. § 4569.

Supreme Court, U. S.
FILED
DEC 13 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

76-6761

NO. _____

DRESSER INDUSTRIES, INC.,
Petitioner

v.

EVERETT C. WEBB,
Respondent

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

GUS KOLIUS of
JAMAIL & GANO
3300 One Allen Center
Houston, Texas 77002

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IN THE

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

COMES NOW the respondent EVERETT C. WEBB (referred to as the Plaintiff or the Appellee in the opinions of the Courts below), and files this Brief in Opposition to the Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit, urging that such petition be in all things denied, and in support thereof would show this Honorable Court the following:

I.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit is reported, see *Webb v. Dresser Industries,* 536 F.2d 603 (5th Cir. 1976), rehearing denied (1976), and is contained in Appendix A of the Petitioner's Application for the Writ of Certiorari.

The opinion of the United States District Court for the Southern District of Texas is unreported, and is contained in Appendix D of the Petitioner's Application for the Writ of Certiorari [hereinafter Petitioner's Brief].

II.

JURISDICTION

The Respondent does not contest the statement of jurisdiction by the Petitioner.

III.

QUESTIONS PRESENTED

The Respondent has no additions to the questions presented for review by the Petitioner.

IV.

STATUTES, RULES, AND REGULATIONS INVOLVED

The Respondent has no additions to those statutes, rules, and regulations cited by the Petitioner for consideration.

V.

STATEMENT OF THE CASE

The Respondent would respectfully refer this Court to the Summary of Facts contained in the Fifth Circuit's opinion, reprinted in Appendix A, pages 14-17, of the Petitioner's Brief, for an accurate and complete summary of the facts. The Petitioner's statement of the case is inaccurate in at least one important respect in that the Petitioner asserts that the "District Court held that the vessel was unseaworthy because the vessel did not have a 'slop chest' as required by 46 U.S.C. §670." The District Court never made such holding; its holding concerning unseaworthiness specifically excludes reference to the "slop chest" statute, which was applied only to the negligence findings. See the opinion of the District Court in Appendix D, pp. 40-42, of Petitioner's Brief.

VI.

ARGUMENT

A. THE COURT OF APPEALS HAS NOT CREATED AN OBLIGATION ON THE PART OF VESSEL OWNERS "WHICH GOES BEYOND THE REALM OF REASONABLENESS" OR WHICH IS "CONTRARY TO THE HOLDINGS OF THIS COURT."

The Petitioner, in asserting to this Court that the Fifth Circuit in its opinion below held that "a vessel owner is required to furnish crew members, including the captain of the vessel, with special footgear, and that to not do so renders the vessel unseaworthy," Petitioner's Brief at p. 5, has completely misrepresented that Court's decision. The only accurate representation of the Fifth Circuit's descrip-

tion of the duty of a vessel owner is that contained in the actual language of the Fifth Circuit's opinion. The Fifth Circuit was careful to describe the duty of the vessel owner regarding the supplying of footwear or other gear as follows:

> "In affirming the lower court's conclusion of unseaworthiness, we are not creating a general duty of a shipowner to provide all of its seaman with boots adequate for all foreseeable shore duties. Instead, the defendant needs to make boots available only for those crew members ordered to work under foreseeably adverse circumstances. Alternatively, the defendant can protect itself by sending ashore only those seaman who it has ascertained have the necessary footwear whether that footwear is provided by the shipowner or the sailor."

Webb v. Dresser Industries, 536 F.2d 603, 607 (5th Cir. 1976); See Appendix A of the Petitioner's Brief at p. 20.

Rather than placing an unqualified duty on the vessel owner, the Fifth Circuit has carefully stated that the vessel owner has a duty to provide footwear and other gear to the seaman only in cases in which it is *foreseeable* that such crew members will be ordered to work under adverse conditions. In failing to bring to this Court's attention this important aspect of foreseeability, which formed an integral part of the definition of the duty of the vessel in the Fifth Circuit's decision, the Petitioner has completely misrepresented to this Court the decision below and has completely distorted that Court's holding.

Moreover, the Fifth Circuit's statement of the duty of a vessel owner with regard to providing footwear or other protective gear finds support in a number of other deci-

sions. See, e.g., *White v. Rimrock Tidelands Inc.,* 414 F.2d 1336 (5th Cir. 1969) (allegation that Defendant shipowner did not provide protective boots or other safety equipment for seaman directed to enter tank containing caustic drilling mud stated a claim for unseaworthiness); *Johnson v. Warrior & Gulf Navigation Company,* 516 F.2d 73 (5th Cir. 1975) (finding stevedore's obligation to furnish longshoremen with proper shoes). Thus it is clear that the Fifth Circuit's statement of the duty of the vessel owner in this case is accurate and is supported by the case law, and the Petitioner cites no specific authority to the contrary. This point of argument should be overruled.

B. THE PETITIONER NEVER CONTENDED AT ANY TIME IN THE COURTS BELOW THAT A CAPTAIN SHOULD BE TREATED DIFFERENTLY THAN OTHER SEAMEN AND THE COURT OF APPEALS HAS CORRECTLY APPLIED THE APPLICABLE LAW TO THE PLAINTIFF/RESPONDENT.

The Petitioner raises for the first time in this Court the contention that the Plaintiff/Respondent "was not subject to a statutory obligation to follow orders as a seaman might be while at sea." See Petitioner's Brief at p. 7. The Petitioner is again misrepresenting to this Court its position in this case. The Fifth Circuit has specifically noted that the Petitioner, Dresser Industries, made no such contention during any stage of the trial or appeal of this case:

> "On appeal, Dresser Industries does not challenge Webb's contention that when he went to the bus station he was a seaman, acting on behalf of the

> ship. Nor does appellant dispute the district court's conclusion that Webb falls within the scope of coverage provided by both the Jones Act and the general maritime law. Moreover, no special problems as to the scope of the maritime law are presented by the fact that the injuries sustained here actually occurred on land, and Defendant makes no such contentions. [citations omitted]"

Webb v. Dresser Industries, supra at 605, note 3; Appendix A of Petitioner's Brief at p. 16, note 3.

Moreover, the Petitioner cites no authority whatsoever for the proposition that a captain of a vessel, or a mate acting in the capacity of captain in the absence of the regular captain, see *Webb v. Dresser Industries, supra* at 605, note 1, is treated differently than any other seaman under the applicable law. Since petitioner never raised this matter at any time during the trial or on appeal, and since Petitioner has thus waived any such contention, and since Petitioner cites no authority whatsoever in support of any such contention, even if properly raised, this point of argument should be overruled.

C. THE DIRECTIONS TO THE DISTRICT COURT BY THE COURT OF APPEALS REGARDING COMPARATIVE NEGLIGENCE ARE NOT "TOO RESTRICTIVE" AND ARE NOT "IN DIRECT CONFLICT WITH ACCEPTED TORT PRINCIPLES."

The Fifth Circuit, in its opinion below, accurately and succinctly summarized the principles of comparative negligence as applied to the facts in the instant case. See *Webb v. Dresser Industries, supra* at 607-610; see Appendix A of the Petitioner's Brief at pp. 21-26.

Moreover, the Fifth Circuit vacated and remanded the instant case to the District Court for the specific purpose of requiring the District Court to consider the issue of comparative negligence and to make a finding of fact and conclusion of law in that regard. Since the Petitioner cites no authority whatsoever in support of his contention that the directions to the District Court by the Fifth Circuit regarding comparative negligence were "too restrictive" or were "in direct conflict with accepted tort principles," and since the District Court has not yet had a chance to make findings of fact and conclusions of law with respect to comparative negligence and enter a final judgment in that respect, this point of argument should be overruled.

D. THE COURT OF APPEALS, IN UPHOLDING THE DISTRICT COURT'S FINDINGS AND CONCLUSIONS REGARDING UNSEAWORTHINESS, IS UNDER NO OBLIGATION TO ISSUE AN ADVISORY OPINION TO THE PETITIONER REGARDING 46 U.S.C. §670.

The Fifth Circuit, in affirming the District Court's findings and conclusions regarding unseaworthiness, did not discuss the negligence theories advanced by the Respondent in the District Court. The District Court found as an alternate theory in support of its judgment that the Plaintiff/Respondent could recover under the Jones Act, 46 U.S.C. §688 et seq. The basis of the District Court's decision was its determination that the Petitioner Dresser Industries (1) negligently failed to maintain a safe place to work and (2) violated a sefety statute, thus requiring a finding of negligence *per se*. The safety statute is the so-called "slop chest statute," 46 U.S.C. §670. The Fifth

Circuit carefully explained its reasons for upholding the District Court's findings and conclusions regarding unseaworthiness, see *Webb v. Dresser Industries, supra* at 606-07; Appendix A at p. 18-20 of Petitioner's Brief, and carefully explained that it was pretermitting any consideration of the negligence issue:

> "Having affirmed the lower court's decision that the *M/V CANADIAN OLYMPIC* was unseaworthy, we need not rely on the district court's alternative Jones Act theories, and therefore, we pretermit any discussion of the negligence issue.

Webb v. Dresser Industries, supra at 607, note 5; Appendix A at p. 21, note 5, of Petitioner's Brief.

When there are several theories upon which a judgment may be upheld, one of which is sufficient under the evidence and the law to support the judgment, an appellate court need not write in *dicta* regarding alternative theories to uphold that judgment. The Petitioner Dresser Industries is not entitled as a matter of right to an advisory opinion on other issues that were not necessary to a decision in this case.

E. THE COURT OF APPEALS DID NOT APPLY THE CLEARLY ERRONEOUS DOCTRINE TO FINDINGS OF FACT INDUCED BY ERRORS OF LAW.

The Petitioner asserts "[I]n this case the findings of fact were based upon an erroneous conclusion that the appellant was required to have a 'slop chest' on board the *M/V CANADIAN OLYMPIC*, yet the Court of Appeals applied the erroneous doctrine." This confused assertion is wrong for several reasons. First, findings of fact are not based on conclusions of law or applications of law; findings of fact are based on the evidence and proof adduced at the trial. Secondly, since the Fifth Circuit upheld the District Court's decision on the theory of unseaworthiness, and did not discuss the negligence theories, as explained above, there is no "erroneous conclusion" regarding the "slop chest statute," 46 U.S.C. §670, upon which an appeal can be based. Finally, with respect to the Petitioner's assertion that "the Appeals Court can correct those findings," Petitioner asserts no authority and the Respondent is aware of no authority for the proposition that an appellate court can "correct" findings of fact. This point of argument should be overruled as frivolous.

WHEREFORE, PREMISES CONSIDERED, the Respondent, EVERETT C. WEBB, respectfully prays that the Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit be in all things denied.

Respectfully submitted,

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